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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

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No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
*Respondents*

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No. 71-1040

UNITED GAS PIPE LINE CO., ET AL., *Petitioners,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
*Respondents*

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## REPLY IN PARTIAL OPPOSITION TO MOTION FOR EXPEDITED CONSIDERATION AND PETITIONS FOR WRITS OF CERTIORARI

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RICHARD W. DUESENBERG,
DWIGHT W. MILLER,
800 N. Lindbergh Blvd.,
St. Louis, Missouri 63166,

JOHN T. MILLER, JR.,
1001 Connecticut Ave., N. W.
Washington, D. C. 20036

*Counsel for Intervenor*
*Monsanto Company*

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## RELY IN PARTIAL OPPOSITION TO MOTION FOR EXPEDITED CONSIDERATION AND PETITIONS FOR WRITS OF CERTIORARI

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This reply is limited to the first question raised by the Federal Power Commission's Petitions for Writs of Certiorari which is stated in terms of the Commission's authority to approve a plan of curtailment of interstate gas service to direct customers under the Natural Gas Act.[1] Monsanto Company's rights are directly

[1] The question posed by the Commission reads as follows: "Whether the Federal Power Commission has jurisdiction under the Natural Gas Act, 15 U.S.C. 717, *et seq.*, to accept, approve, or modify a plan for the curtailing of natural gas deliveries by interstate pipelines to direct corporate users in order to effect a fair allocation of natural gas supplies among all ultimate gas consumers, including domestic users, in times of gas shortage." (Petitions for Writs of Certiorari, pp. 4-5.)

and adversely affected by the Commission's mode of stating the issue in light of its attempt to obtain a review of FPC Opinion 606,[2] and by its reference to Monsanto's pending suits in lower Courts against the Commission and United.

These Petitions for Writs of Certiorari arise from an extraordinary set of circumstances. They involve a most unusual breakdown in Federal Power Commission supervision of United Gas Pipe Line Company (United), a regulated natural gas pipeline company. This regulatory vacuum was exploited by a breach of the company's responsibilities as trustee of its gas supplies for the benefit of the firm customers which relied upon it for all of their gas supplies. The result was and is a breach by United of its gas supply contracts with a large number of its customers.

The question posed by the Commission incorrectly assumes that United's situation is typical. If answered by this Court without a realization of the real facts, United would escape accountability for its derelictions. To avoid this unjust result, the question of Commission jurisdiction over the curtailment of gas service to direct customers by United should be restated as follows:

1. Whether, in an industry in which forward supply-demand planning is the universal practice, a regulated natural gas pipeline company can lawfully curtail firm service to direct customers being provided under Federal Power Commission authorization, for reasons of gas sup-

[2] Issued October 5, 1971 in *United Gas Pipe Line Co.*, Docket Nos. RP 71-29, *et al.* Monsanto participated actively in the FPC proceedings leading to Opinion No. 606 and has petitioned to intervene in the appeals from that Opinion pending in the United States Court of Appeals for the Fifth Circuit.

ply deficiencies, without complying first with the abandonment provisions of Section 7(b) of the Natural Gas Act,[3] 15 U.S.C. 717f(b)?

## STATEMENT

Monsanto is a direct firm customer of United. United has been authorized by the Federal Power Commission to transport up to 75,000 Mcf per day on a firm basis to Monsanto's Pensacola, Florida Plant upon a finding that it "is necessary and appropriate in carrying out the provisions of the Natural Gas Act" and required "by the public convenience and necessity".[4] Monsanto's Plant is the largest integrated nylon yarn manufactory in the world and the second largest non-governmental employer in the State of Florida.

United has severely reduced service to Monsanto below its firm contract entitlement of 65,000 Mcf per day during the past fifteen months without Monsanto's consent, effecting thereby an abandonment of service, without first obtaining the requisite permission of the Commission under the Natural Gas Act. Monsanto has sought to make United accountable for its actions in proceedings before the Commission,[5] through appeal from orders of the Commission,[6] and by a suit in District Court.[7]

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[3] The text of section 7(b) is set out in Appendix C hereto.

[4] *United Gas Pipe Line Co.*, 34 F.P.C. 892 (1965).

[5] United Gas Pipe Line Company, Docket Nos. RP71-29, RP71-120.

[6] *Monsanto Company* v. *FPC*, No. 71-1306 (C.A.D.C.).

[7] *Monsanto Company* v. *United Gas Pipe Line Co.* (D.D.C.) Civil Action No. 2037-71; order of dismissal on jurisdictional grounds appealed. *Monsanto Company* v. *United Gas Pipe Line Co.*, No. 72-1093 (C.A.D.C.).

The Commission has drawn this Court's attention to Monsanto's suits.[9] The purpose seems obvious. Starting with the unfounded assumption that the Federal Power Commission has and does regulate United effectively, this Court is to be induced to decide an extremely general question of Commission jurisdiction which may constitute a prejudgment of Monsanto's rights against United.

## THE COURT MUST GET THE FULL FACTS BEFORE IT ACTS

The Commission infers that United's operations are no different than those of six other interstate natural gas pipeline companies recently curtailing gas service for reasons of gas supply deficiencies.[10] A comparison set forth in the margin shows that, in terms of the issue of firm service to direct industrial customers, United is in a class all by itself.[11]

[9] Petitions for Writ of Certiorari, n. 1 and 2.

[10] *Id.* at 13.

[11] United is the only major interstate natural gas pipeline company with a large number of firm direct mainline customers among the seven pipeline companies curtailing service.

| *Pipeline Company* | *Number of Firm Direct Mainline Customers* | *Firm Direct Mainline Sales as Percentage of Total Annual Sales* |
|---|---|---|
| Arkansas Louisiana Gas Co. | 0 | 0 |
| Natural Gas Pipeline Company | 2 | 0.898% |
| Panhandle Eastern Pipe Line Co. | 0 | 0 |
| Texas Eastern Transmission Corp. | 0 | 0 |
| Transcontinental Gas Pipe Line Corp. | 1 | 0.290% |
| Trunkline Gas Company | 1 | 0.005% |
| United Gas Pipe Line Company | 237 | 37.445% |

Source: FPC Form No. 2 for year 1970, Gas Operating Revenues, Customers and Sales.

United's situation is *unique* in a far more significant sense. Since the Fall of 1968 United has been allowed by the Commission to enlarge its service to some customers despite the fact that it faced an impending gas deficit. Until late 1970, it can be said now that the Commission did not know the true state of United's gas supplies. United concealed from the Commission the fact that confidential in-house studies showed as early as June 1968 that United's gas supplies were depleted to the point where deficits could be anticipated in 1968-1969 and succeeding winters.[11] Nonetheless, United initiated very large volumes of additional firm gas service in the Fall of 1968 and in every year since then.[12] The additional firm service could only be provided by curtailing firm service already being rendered to other customers.

Since November 1970, with the knowledge of the Commission, United has voluntarily and without re-

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[11] Monsanto's attorneys discovered the secret studies, made them available to the Commission and to the public, and introduced them into evidence in the 1971 proceedings before the Commission in Dockets RP71-29, *et al.* Appendix A contains Exhibit 30 from those proceedings which shows the deficits forecasted by the secret studies as early as 1968-1969 while the annual gas supply reports of United to the FPC on Form No. 15 showed no deficit before 1973. Ignorant of the misleading character of the data filed with it, the Commission authorized United in 1969 and 1970 to enlarge its service in reliance on the Form No. 15 reports.

[12] Since the Fall of 1969, when United now admits it first knew it was short of gas, United has added over 1,000,000 Mcf per day of additional firm service. Between the Fall of 1968 when United's secret studies show it anticipated a gas deficit and the Fall of 1969, United added another 385,000 Mcf per day of new firm service. These figures are taken from an affidavit filed by Mr. R. A. Ransom, consulting engineer, with the District Court in Monsanto's suit in Civil Action No. 2037-71. Mr. Ransom's knowledge of United's system goes back forty years.

straint by the Commission continued to enlarge service to preferred customers despite the fact that the pipeline's gas supplies were deteriorating and it could only provide the new service by further curtailing firm service to Monsanto and other firm customers.[13]

What United and the Commission characterize blandly as a curtailment plan is no less than a curtailment of firm service to its direct and wholesale firm customers which is the fruit of a deliberate and improvident policy of premature exhaustion of gas supplies through undertaking enlarged service which United's dedicated gas supplies could not possibly support.

The issuance of Opinion 606 afforded the Commission an opportunity to halt United's expansion of service. The Commission instead remanded the matter to the Hearing Examiner, thus assuring that Monsanto and other injured customers would receive no relief from the Commission for a matter of months.

Monsanto then turned to the United States District Court for the District of Columbia for help, seeking (1) an injunction prohibiting United from continuing to enlarge its firm service and from curtailing firm service to Monsanto in order to provide firm service to others already undertaken with knowledge of an impending gas deficit; (2) a declaratory order, in light of Section 7(a) of the Natural Gas Act[14] and *Granite City Steel Co.* v. *FPC*, 115 U.S. App. D.C. 392, 320 F.2d

[13] Since January 1971, United has enlarged service over 200,000 Mcf per day. Appendix B to this Reply contains a tabulation prepared by United and placed in the record before the Commission by Monsanto on July 15, 1971 which put the Commission on notice of these intended increases in service.

[14] 15 U.S.C. § 717f(a). The text is set out in Appendix C hereto.

711 (1963),[15] that United could not enlarge firm service to customers by curtailing existing firm service; and (3) damages for breach of contract since United began curtailing firm service in November 1970. The District Court dismissed the suit, and a companion suit brought by Texas Gulf Sulphur Company,[16] not because the claims for damages were unjustifiable or the need for injunction unwarranted, but on the grounds that the Commission had exclusive jurisdiction and administrative remedies had not been exhausted.

While the sale by United to Monsanto is non-jurisdictional under Section 1(b) of the Act,[17] the transportation of the gas was authorized by the Commission.[18] The abandonment provisions of the Natural Gas Act include both transportation and sale. *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83 (1966).

> "United was found 'able and willing . . . to perform the *service* . . .' for which it had volunteered. A certificate was accordingly issued and formally accepted by United. United now wishes to abandon the express service it agreed to perform * * * without a § 7(b) finding by the Commission 'that the present or future public convenience and necessity permit such abandonment.' This is precisely what the Act forbids."[19]

The Commission poses the question to this Court in terms of "curtailing" gas service, a term alien to the

[15] This case held that Section 7(a) means that persons "desiring gas for the first time, or desiring more gas, should not get it by taking it away from existing lawful customers." 320 F.2d at 713.

[16] *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, (D.D.C.), Civil Action No. 2253-71.

[17] 15 U.S.C. § 717(b). The text is set out in Appendix C hereto.

[18] *United Gas Pipe Line Co.*, 34 F.P.C. 892 (1965).

[19] 385 U.S. at 91 (footnote omitted.)

text of the Natural Gas Act. The Commission wants this Court to affirm its power to "accept, approve or amend" a curtailment plan, when it means approval of a plan to take firm gas service away from Monsanto and others without meeting the notice, hearing and decisional requirements of section 7(b). This is to be done, states the Commission, "to effect a fair allocation of natural gas supplies among all ultimate gas consumers"; when the Commission means a reallocation of of firm gas supplies away from Monsanto and other direct firm customers to provide firm gas service to other preferred customers receiving enlarged service for industrial and other purposes after United was short of gas and curtailing firm gas service. The Commission refers to the need to protect "domestic users" but fails to inform this Court that every contract between United and its customers gives first priority to domestic consumers.

## PRIVATE SUITS FOR DAMAGES AND INJUNCTION CAN BE "A MOST EFFECTIVE WEAPON" FOR ENFORCING THE NATURAL GAS ACT

United's gas shortage came as no surprise to United. Its secret studies forecast the result. United could have forestalled the shortage by refusing to attach new service. Or, having chosen the course of adding service "by taking it away from existing lawful customers", *Granite City Steel Co.* v. *FPC, supra*, United had both the obligation and the time to file a petition with the Commission in accordance with the abandonment provisions of section 7(b) of the Natural Gas Act.

The Commission has gone out of its way in Opinion 606 to protect United from accountability for its reduction of gas service.

> "Implementation of the curtailment plan itself, pursuant to our procedures, would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts affected by curtailments that may be initiated in the Courts. * * *" [20]

We can only assume that the Commission is trying to draw this Court into approving this statement too. The very ambiguity over this purpose could be clarified by an order of this Court more narrowly delineating the issues here.

The primary purpose of the Natural Gas Act was to protect consumers from exploitation at the hands of natural-gas pipeline companies.[21] Protection of the pipeline company against suits by injured consumers arising from its violations of the Natural Gas Act, breach of trust and breach of contract would defeat this purpose as the Commission cannot grant reparations.[22]

The Commission's attempt to garner to itself total regulatory authority also ignores Section 22 of the Natural Gas Act.[23] This provision provides a supplemental means of enforcement at the behest of an injured person. The possibility of damage suits and injunctive relief represent "a most effective weapon" in the enforcement of obligations under the Act. To limit

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[20] Petitions for Writs of Certiorari, App. E, p. 69a. Dissenting Commissioner Carver opposed this statement: "A proper sense of comity in judicial-administrative relations calls for an abandonment of this fruitless attempt to delimit judicial remedy." (Petitions for Writs of Certiorari, App. F, p. 84a).

[21] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

[22] *Id.* at 618.

[23] 15 U.S.C. § 717u. The text is set out in Appendix C hereto.

an injured consumer to the processes of a Commission which has already failed to provide the protection necessary to avoid injury is not an acceptable alternative. The "hurdles that the victim might face * * * might well prove insuperable to effective relief." *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 435 (1964).

In *Borak*, a private suit relying upon a provision of the Securities Exchange Act of 1934 similar to Section 22 of the Natural Gas Act, this Court emphasized the remedial nature of the provision:

> "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). * * *" [24]

## CONCLUSION

The reduction of service by United warrants immediate review by this Court. However, United is so unique both in terms of the nature of its market and its escape from regulation that these appeals should be limited to a determination of the legality of United's actions only. The record before the Commission in the proceedings in which Opinion 606 was issued is necessary to this review. That record is quite long. Respondents should have at least until April 28 to file their

[24] 377 U.S. at 433.

replies, should the Petitions for Writs of Certiorari be granted.

Respectfully submitted,

RICHARD W. DUESENBERG,
DWIGHT W. MILLER,
800 N. Lindbergh Blvd.,
St. Louis, Missouri 63166,

JOHN T. MILLER, JR.,
1001 Connecticut Ave., N. W.
Washington, D. C. 20036

*Counsel for Intervenor*
*Monsanto Company*

February 1972

## UNITED GAS PIPE

Comparison of anticipated gas deficiencies shown
Power Commission with anticipated deficits shown

(Volumes in M

| *Date of Report* | *Type of Report* |
|---|---|
| May 1968 | In-House study |
| September 1968 | " " |
| October 1968 | " " |
| 12/31/68 | Form No. 15 |
| May 1969 | In-House study |
| September 1969 | " " |
| January 6, 1970 | " " |
| 12/31/69 | Form No. 15 |
| September 1970 | In-House study |
| November 1970 | " " |
| 12/31/70 | Form No. 15 |

[1] United actually curtailed firm service on its system in
[2] United began its current curtailment of firm service p
[3] Not available, 3/15/71.

## LINE COMPANY

on Form No. 15 reports filed with the Federal
on contemporaneous "in-house" reports

f)

| *Year of first anticipated deficit* | *Volume of anticipated deficit* |
|---|---|
| 1968-1969 | 70,010 daily |
| 1968-1969 | 24,425 daily |
| 1968-1969 | 90,777 daily |
| 1974 | 165,371,000 annual |
| 1969-1970 [1] | 367,390 daily |
| 1969-1970 [1] | 173,339 daily |
| 1969-1970 [1] | 176,119 daily |
| 1974 | 69,367,000 annual |
| 1970-1971 [2] | 719,274 daily |
| 1970-1971 [2] | 697,260 daily |
| ---- [3] | ---- annual [3] |

January and February 1970.
ogram on November 1, 1970.

## APPENDIX B

4616

UGPL Co.
Average Day Requirements
In MCF/DAY @ 14.73 Psia

| | Actual * January 1971 | Actual ** January 1971 | Estimated January 1972 |
|---|---|---|---|
| Industrials | 730 | 639 | 778 |
| Power Plants | 753 | 729 | 724 |
| Pipe Lines | 2114 | 2012 | 2127 |
| City Gates | 901 | 892 | 1113 |
| Deliveries Buy-back | — | — | 110 |
| Company Use and Unaccounted for | 32 | 32 | 32 |
| | 4530 | 4304 | 4881 |

* Total requirements (including curtailed volumes).
** Demand supplied (without curtailed volumes).

**APPENDIX B**

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| Company use and unaccounted for | 32 | 32 | 32 |
| | 4530 | 4304 | 4881 |

* Total requirements (including curtailed volumes).
** Demand supplied (without curtailed volumes).

Natural Gas Act, 15 U.S.C. §§ 717, *et seq*:

§ 717 NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. (a) * * *

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

* * *

§ 717d EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE.

SECTION 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Com-

mission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. §717f (b)]

* * *

§ 717u JURISDICTION OF OFFENSES; ENFORCEMENT OF LIABILITIES AND DUTIES

SECTION 22. The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in [former] sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347).[11] No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this act. [52 Stat. 833 (1938); 15 U.S.C. § 717u]